

**NOT TO BE PUBLISHED**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Butte)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

GRANT SCOTT PARKISON, JR.,

Defendant and Appellant.

C059407

(Super. Ct. No.  
CM027413)

Defendant Grant Scott Parkison, Jr., was accused of murder (Pen. Code, § 187, subd. (a); further undesignated statutory references are to the Penal Code) and of personally and intentionally using a firearm causing great bodily injury or death (§ 12022.53, subds. (b)-(d)). A jury convicted him of involuntary manslaughter (§ 192, subd. (b)) and of personally and intentionally using a firearm causing death (§ 12022.5, subd. (a)). The trial court imposed a state prison term of 14 years, consisting of the four-year upper term for the offense and the 10-year upper term for the enhancement.

Defendant contends the trial court erred by instructing the jury with CALCRIM No. 362 and by imposing the upper term on the enhancement. We affirm the judgment.

### FACTS AND PROCEEDINGS

On July 15, 2007, at the Whiskey Flats campground near Paradise, California, defendant fatally shot James Chambers, whom defendant suspected of stealing property from defendant's home. According to the People, defendant committed either an execution-style killing in cold blood or an unlawful homicide with conscious disregard for human life. According to defendant, he committed no crime: while attempting a citizen's arrest of Chambers, he drew his gun in defense of himself and another, and it then discharged accidentally.

Early in July 2007, M.C., a 14-year-old female, was camping at Whiskey Flats with 23-year-old James Chambers; his 16-year-old brother Joshua; Marilyn ("Lou") and Jason C.; M.M., a 16-year-old male; and Joshua's girlfriend, 14-year-old A.K. (We call the Chambers brothers by their first names hereafter for clarity.) The campers would sometimes go into town to eat or shower. Once or twice they saw defendant, whom some of them knew, at or near the site.

M.C. had met James "when he got out of prison," probably around a month and half before. M.C. did not know him to be a member of a violent prison gang, but he had a lot of tattoos, including one that read "BCG."

By the night of July 14, 2007, Jason and Lou had moved to a nearby campsite, while the others stayed together. Around 12:30 or 1:00 a.m., James left in a truck with other people, returning around 6:30 or 7:00 the next morning.

Upon his return to the campground, James produced bags of marijuana plants and told the others to trim the plants while he went to get food for the group. When he came back, they smoked some of the marijuana. M.C. then went to the Jason and Lou's campsite.

According to Joshua, A.K., and M.M., defendant and his sister came by later that day in a pickup truck. Defendant asked James repeatedly if he had stolen defendant's marijuana; James denied it. Defendant drove away.

Defendant and his sister then went to the Jason and Lou's campsite. Defendant asked M.C. and Lou: "Where's my fuckin' weed?" and demanded Lou's purse. Lou told him James had given her the marijuana buds in her pill bottle. Defendant said: "That fuckin' Chambers," then he got in his truck and "peeled out."

According to Joshua, A.K., and M.M., defendant and his sister returned to James's campsite and explored the area, particularly a camper trailer at the edge of the site. At some point, defendant got a gun from his truck. Saying he had seen his "clones" at the site, defendant accused James of burglarizing defendant's house. Defendant pointed his gun at James's head, ordered him to the ground, and kicked him twice in the face. James got up, started to walk away, then turned

toward defendant although not in an aggressive manner. He was not holding a weapon. Defendant shot James in the head.

Defendant dropped the gun and said, "I didn't mean to." Joshua picked up the gun, pointed it at defendant, and ordered him to leave; defendant ran. Joshua threw rocks at the windshield of defendant's truck to try to keep defendant's sister from driving away.

Joshua, A.K., and M.M. admitted having made false statements to the police after the shooting.

J.L., a 16-year-old female at Whiskey Flats with a different group, witnessed a confrontation from 75 to 100 feet away. Two males were yelling at each other at close range. One told the other to get on the ground on his knees. The first man (defendant) said he was going to kill the second man, kicked him in the face, took out a gun, and pointed it at him. J.L. turned away and left.

Five minutes after defendant left the Jason and Lou's campsite, M.C. heard a gunshot. Five or 10 minutes after that, M.M. came running up and said: "Scott just shot James in the face and he's dead."

Around 11:40 a.m. on July 15, 2007, Paradise Police Officer Christopher Pilgrim and his partner responded to a reported burglary at defendant's house. Defendant told the dispatch officer that defendant was armed. When the officers arrived at defendant's house, defendant had an unloaded .45-caliber semiautomatic handgun and he said he was securing the perimeter of his residence in case there was a suspect inside. Officer

Pilgrim entered the house, saw that the front doorjamb was broken, but found no one inside the home.

Defendant said the burglars had taken a gun safe from the master bedroom and a marijuana grow of 12 to 15 plants from the garage. He suspected people he had seen while camping at Whiskey Flats of the burglary and he wanted to go to Whiskey Flats and check things out. Officer Pilgrim said he should not go, but if he went and found his property, he should call the Butte County Sheriff's Office for help.

Butte County Sheriff's Deputy Richard Chandler was sent to Whiskey Flats at 1:49 p.m. on July 15, 2007, to investigate a crime scene. As he and Deputy Thorsten Turenne arrived, they saw the victim of a gunshot wound lying on the ground. A .45-caliber semiautomatic handgun which according to witnesses was the one used by the shooter was on the ground nearby. The gun had eight rounds in the clip, but none in the chamber. Deputy Chandler found one shell casing on the ground.

Near the crime scene, the deputies came across a red truck with a smashed windshield; a man and a woman were standing outside the truck. The woman, who seemed "upset and emotional," said: "He's still alive." The man (defendant) said: "I'm sorry, I didn't mean to pull the trigger." Deputy Turenne handcuffed defendant and put him into the deputy's patrol vehicle.

Around 9:00 p.m. on July 15, 2007, Butte County Sheriff's Deputy John Ryan interviewed defendant after defendant waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436

[16 L.Ed.2d 694])). Defendant said he went to Whiskey Flats to locate his stolen property and confronted James, hoping to scare him into confessing. Defendant was looking for his marijuana and for firearms his grandfather had given him; he cared more about the firearms, which were a memento. He intended to take photographs he could give the police to help them recover his property. He did not mention any plan to conduct a citizen's arrest.

When defendant arrived at the campsite, James's little brother and other young people were there, along with some "[m]uscular, tatted-up white guys." Defendant knew James was just out of prison and ran with a violent crowd.

Defendant was angry, upset, and "pumped." He had "an anger-management issue stemming from some brain operations he's had in the past."

According to defendant, James denied the burglary, but picked up a stick resembling a pool cue and swung it threateningly; he was "confrontational, getting in [defendant's] face." Out of fear for his own and his sister's safety, defendant produced his gun, hoping to detain or control James and others there. The gun then discharged by accident. The "big guys" at the site took off. Defendant did not know James had died; on learning that near the end of the interview, defendant broke down crying.

Butte County Sheriff's Detective Eric Christopher, who was present during this interview, conducted a second interview on July 17, 2007. Defendant said he had discovered before July 15

that the gun he used on that date was unreliable: it did not always feed a bullet from the magazine into the chamber.

Defendant said he grew marijuana to relieve pain arising out of prior surgery, which had also affected his right-side vision in both eyes. He cultivated clones, growing them in Dixie cups, to produce strains he called "Pot of Gold," "Purple Erkel," and "Dragon Krack." A Dixie cup with "POG" written on it was found at the crime scene.

On July 18, 2007, Detective Christopher interviewed defendant again. This time defendant mentioned that he knew the marijuana buds in Lou's pill bottle were his because they had a distinctive skunk-like smell. She told him where they had come from.

Defendant also said that back at James's campsite, defendant heard that some of his clones were over by the camper shell. After seeing one of his Dixie cups there, he confronted James. James's demeanor was "[d]efiant" and "[c]locky," displaying a "prison hard-ass mentality."

James was not armed, but someone said: "Watch out, there's a stick behind him"; the stick, which looked like a tree branch, was lying on the ground. Defendant then heard two people, including his sister, say that James had grabbed the stick. Investigating officers did not find any tree branch at the scene that could have been used as a weapon.

Defendant said the gun he was carrying had always had firing problems. The slide would not come all the way forward after a shot, causing a "failure to feed." After a recent

repair, the trigger felt different. Defendant had not put the safety on the gun: his "adrenaline was pumping" and he had not "taken care of it."

Defendant kicked James, but only to push him away. He did not see James grab a weapon. However, as he held the gun he was looking to his left because he feared a blow in the back of the head from a rock, which could cause a fatal injury due to his prior surgeries. He had to turn his head completely to look at two males approaching the site because they were in his blind spot.

Defendant did not say he was trying to make a citizen's arrest. He did not explain why he had brought his sister along.

Dr. Thomas Resk, a forensic pathologist who autopsied James, opined that the cause of death was a single perforating gunshot that passed through James's brain from front to back and from right to left and exited his head. There were no signs of a struggle on James's body. There was no gunpowder tattooing or stippling, which meant that the shot was not fired from close range. Toxicology testing revealed methamphetamine and marijuana in the victim's system.

Brandy Spas, a Department of Justice criminalist, tested defendant's gun and found it fired properly, with no "failure to feed." It was a single-action/double-action weapon with a normal trigger pull in both modes.



## DISCUSSION

### I

#### *CALCRIM No. 362*

Defendant contends the trial court erred prejudicially by instructing the jury over objection with a modified version of CALCRIM No. 362: "If you find that the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intended [*sic*] to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement . . . cannot prove guilt by itself." We disagree.

Defense counsel objected that there was no factual basis for the instruction. The prosecutor asserted it was justified because defendant testified he was looking away from the victim when he fired the shot, but others testified he was looking straight at the victim. The trial court decided to give the instruction based instead on the fact that defendant testified he retrieved his gun from the truck only after learning there was a weapon at the campsite, but others testified that he retrieved it immediately on returning to the site.

Defense counsel asked the trial court to modify the instruction's first sentence so that it would read: "If you find that the defendant made a false or misleading statement

. . . ." (CALCRIM No. 362 in its standard form begins: "If [the] defendant [\_\_\_\_\_ <insert name of defendant when multiple defendants on trial> ] made a false or misleading statement . . . .") The court agreed to do so.

Relying only on federal appellate decisions, defendant asserts that even as modified the instruction presumes guilt and is argumentative in favor of the prosecution. However, this court has already upheld CALCRIM No. 362 against essentially the same contention. (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103-1104 (*McGowan*).) Defendant ignores *McGowan* in his opening brief. Notwithstanding the fact that the People cite *McGowan*, defendant continues to ignore it in his reply brief. On that basis alone, his contention must fail. In any event, we agree with *McGowan* and there was no error.

## II

### *The Upper Term*

Defendant contends the trial court abused its discretion by imposing the upper term on the gun use enhancement (§ 12022.5, subd. (a)) because the court made an improper dual use of facts. We disagree.

The probation report recommended the 10-year upper term because: (1) defendant not only brandished the firearm, but also threatened the victim with it and then used it; and (2) knowing that he had an anger management problem, he took the firearm to a scene which he knew would be or could become volatile.

The trial court imposed the upper term on the involuntary manslaughter offense because defendant had a history of violence, was on probation when the offense was committed, and did not satisfactorily complete any prior probation. His remorse did not outweigh these factors in aggravation.

The trial court then imposed the upper term on the enhancement, stating the following reasons:

"The Court looked at the admissions that the defendant made, both in his statements prior to the trial and . . . in his statements at trial.

"I think that this outcome was foreseeable and expected when [defendant] is aware of his propensity to get upset. He himself was involved in anger management. He knew that he had problems with anger. He went down there with a gun. He knew the gun was loaded because he had to have loaded it because he admitted that it had been unloaded when he showed it to the Paradise [p]olice at his home.

"He went down there, he indicated that he was in deed [*sic*] pumped up, that he was intense, that he was looking for evidence of the burglary from his house, that he confronted the victim, that he ordered him to the ground. All of this, with going down to an isolated area in the state of mind that he was in, certainly is foreseeable and it certainly is expected that a gun could be discharged and cause serious bodily injury or, as in this case, death.

"The Court is going to find that there are many, many factors that would allow the Court to give the upper term for

the enhancement. He brandished the firearm, he ordered the victim to the ground, he knew that the gun was loaded and racked, and it was completely foreseeable that ordering Mr. Chambers to the ground and causing him to sweat it out caused a great risk of death. For that reason, the Court is going to find the upper term for the enhancement."

Defendant asserts that the trial court could not properly use brandishing a firearm to impose the upper term on the enhancement because brandishing is an element of the offense of involuntary manslaughter as found by the jury in this case. He relies on rule 4.420(d) of the California Rules of Court (undesigned rule references that follow are to the California Rules of Court), which states: "A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term." However, this rule does not apply to enhancements. Rule 4.420 pertains to "*each count* for which the defendant has been convicted." (Italics added.) An enhancement is not a "count."

Sentencing on enhancements comes under rule 4.428, which states in part: "No reason need be given for imposing a term for an enhancement that was charged and found true." Rule 4.428 does not facially bar the use of an element of an offense to impose the upper term on an enhancement, and defendant cites no authority so construing the rule. For that reason alone, defendant's contention fails. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794.)

Furthermore, brandishing a firearm is not an element of the enhancement found by the jury. Section 12202.5, subdivision (a), provides: "[ ] Except as provided in subdivision (a) [not applicable here], any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense." Use of a firearm is not an element of involuntary manslaughter, which may be committed without a firearm. Moreover, one can personally use a firearm in the commission of a felony without brandishing the firearm. (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1492 [§ 12022.5, subd. (a), not limited to situations where gun pointed at victim or defendant explicitly threatens harm]; *People v. Arzate* (2003) 114 Cal.App.4th 390, 400 ["use" of a gun may involve display, brandishing, or firing gun].) Thus, even if the dual-use problem posited by defendant applied to enhancements in general, it would not apply here.

Defendant asserts alternatively that his involuntary manslaughter conviction could have been based on a jury finding that he acted lawfully but "without due caution and circumspection" (§ 192, subd. (b)), i.e., with criminal negligence. From this premise he reasons that even if the jury found he brandished a firearm, it "necessarily found that [he] acted lawfully in pointing the gun at Chambers, but acted negligently when he fired it." Therefore, defendant concludes, "brandishing the gun was lawful conduct, while loading it and

racking it, as well as the foreseeability of risk inherent in those acts, was the criminally negligent conduct that was an element of the involuntary manslaughter conviction" and thus could not be used to impose the upper term on the enhancement. As this argument, like the previous argument, assumes fallaciously that an element of an offense may not be used to aggravate an enhancement, we reject it on the same grounds as the previous argument.

Defendant has failed to show that any of the reasons stated by the trial court were improper grounds for imposing the upper term on the enhancement.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_  
HULL, Acting P. J.

We concur:

\_\_\_\_\_  
ROBIE, J.

\_\_\_\_\_  
BUTZ, J.